91-1162

No.

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1991

SID GOODMAN & COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "implied duty clause" of the Perishable Agricultural Commodities Act ("PACA"), which prohibits a PACA licensee's "*fail[ure]* . . . to *perform* any . . . duty, express or implied," may also be interpreted to prohibit a "fail[ure]" to "*refrain*" from "corrupting" a licensee's customer's employees, in effect turning the clause into an unlimited prohibition against all unfair trade practices in the industry?

2. Whether, in the context of a federal regulatory scheme affecting over 15,000 licensees, the Department of Agriculture has absolute discretion to formulate and apply a concededly new interpretation of PACA's "implied duty clause" for the first time in a PACA license revocation proceeding?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sid Goodman & Co., Inc., prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 1, 1991.[1]

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reprinted in Petitioner's Appendix ("Pet. App.") at 2a. The opinion of the Judicial Officer of the United States Department

[1] All parties are named in the caption. Sid Goodman & Co., Inc. has no parent companies, subsidiaries or affiliates.

of Agriculture (the "Department") is reported at 49 Agric. Dec. 1169, and is reprinted in Pet. App. at 15a. The opinion of the Administrative Law Judge ("ALJ") of the Department is unpublished and is reprinted in Pet. App. at 45a.

JURISDICTION

On October 25, 1990, Sid Goodman & Co. filed a Petition pursuant to 28 U.S.C. § 2342(2) in the United States Court of Appeals for the Fourth Circuit seeking review of the Department's Order of September 26, 1990, revoking Sid Goodman & Co.'s license under the Perishable Agricultural Commodities Act.[2] On October 1, 1991, a panel of the United States Court of Appeals affirmed the Department's Order. On November 5, 1991, that panel also denied a timely petition for rehearing and the full court denied a suggestion for rehearing *en banc*. Pet. App. 1a. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portion of Section 2(4) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b(4) is as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce —
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce

[2] The caption in the United States Court of Appeals for the Fourth Circuit named as a Respondent Clayton Yeutter, in his official capacity as Secretary of the United States Department of Agriculture. Since that time, Mr. Yeutter has been replaced by Edward Madigan, and the caption accordingly reflects this change.

> by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.

The full text of Section 499b is printed in Pet. App. at 80a. This case also involves Section 10(e) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which is printed in Pet. App. at 75a. The regulation involved in this case is 7 C.F.R. § 46.26 (1991), which is printed in Pet. App. at 83a.

STATEMENT OF THE CASE

This is an action by the Department to revoke the PACA license issued to Sid Goodman & Co., a small family business which operates a wholesale fruit and vegetable dealership at the produce market in Jessup, Maryland.[3]

PACA licensees are required, *inter alia*, to "account" for the disposition, by sale or otherwise, of all goods received "on consignment" and to make "prompt payment" of the profit

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[3] Sid Goodman & Co.'s initial PACA license was issued in January 1980 and has been renewed annually. Prior to this proceeding, there is no evidence of any complaints against Sid Goodman & Co. for any violations of PACA. Testimony of James Bright, Department Marketing Specialist, *In re Sid Goodman & Co.*, PACA Dkt. No. 89-523, Transcript of Proceedings before the ALJ ("Tr.") at 61-62 (reprinted in Joint Appendix ("JA") in *Sid Goodman & Co. v. United States*, No. 90-2209 at 124-25).

realized by selling the consignee's goods.[4] In July 1988, the Department investigated a complaint by M. Offutt, who had shipped produce to Sid Goodman & Co. "on consignment." Pet. App. 3a. Specifically, Offutt had questioned the returns and accounting on five lots of melons.[5]

[4] "PACA was originally enacted by Congress in 1930 for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables. The essential need for regulation arose in the unfair activities of commission merchants, dealers and brokers who received shipments from growers and shippers. Upon receiving a shipment of perishable commodities, the commission merchants, dealers and brokers would wrongfully reject the shipment, in many cases making the false claim that the commodities had arrived in a damaged condition or some other claim permitting rejection of the shipment. These fraudulent rejections were made when the market for the commodity was declining so that the commission merchant, dealer or broker would have suffered a loss had he accepted the shipment and paid the contract price. Essentially the Act provides a system of licensing and penalties for violations." *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 990 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974) (citations omitted). "The . . . Act regulates individuals, partnerships, corporations and associations that do business as commission merchants, dealers, or brokers in perishable agricultural commodities in interstate or foreign commerce. A perishable agricultural commodity includes fresh, frozen and iced fruits and vegetables of every kind and character, and cherries in brine. A commission merchant is a person who receives covered commodities for the purposes of sale for or on behalf of another, and who receives a commission for the service. Persons who buy or sell such commodities in wholesale or jobbing quantities, as those terms are defined by the Secretary, are considered to be dealers." 10 Dr. Neil E. Harl, *Agricultural Law* § 72.02 (1989) (footnotes omitted). "The Perishable Agricultural Commodities Act is enforced by the Secretary of Agriculture. Through delegations of authority, the operating agency currently responsible for the daily administration of the program is the Regulatory Branch of the Fruit and Vegetable Division of the Agricultural Marketing Service." *Id.* § 72.01[3] (footnotes omitted).

[5] During this investigation, the employees at Sid Goodman & Co. willingly permitted access to all relevant records. Testimony of James Bright, Tr. at 17, 63 (JA at 80, 126). When the investigation concluded that there had been an underpayment to Offutt, Sid Goodman & Co. promptly gave the

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During the course of its investigation, the Department discovered that, in some cases, Sid Goodman & Co. had made undisclosed payments of 25 cents per package to purchasing agents of its retail customers. In a complaint filed April 18, 1989, the Department alleged that, in making these payments, Sid Goodman & Co. had violated the PACA, 7 U.S.C. § 499b(4).

The original complaint alleged only that Petitioner had violated Section 2(4) of PACA.[6] Not until more than three months later, and then only after repeated orders for clarification, did the Department finally reveal its theory of its case: that if it were proven that Sid Goodman & Co. had given "money or something of value to employees of . . . its customers to induce those employees to make purchases from it on behalf of their employers without informing the employers of this arrangement," the Department would consider this conduct a violation of the "first three unnumbered clauses" of 7 U.S.C. § 499b.[7] The first of these clauses prohibits the making of "false or misleading statements." The second prohibits a failure to "account" or make full "payment." The so-called "implied duty" clause is the third of these clauses.

The Department was at least candid in admitting that the implied duty clause had never before been invoked in this manner, and that the questions of whether it even applied to Petitioner's conduct was a novel issue of first impression.[8]

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investigator a check for the amount due. Testimony of James Bright, Tr. at 29 (JA at 92). It is not clear from the record exactly what gave rise to the full underpayment.

[6] Complaint, *In re Sid Goodman & Co.*, PACA Dkt. No. 89-523, April 14, 1989 (JA at 6).

[7] Complainant's Response to "Request to Complaint Counsel," Aug. 9, 1989 at 2 (JA at 26).

[8] Complainant's Proposed Findings of Fact, Conclusions, and Order before the ALJ, Nov. 30, 1989 at 17 (JA at 28). In a companion case involving many of the same issues, the Department also charged another Maryland

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An oral hearing was held before the Department's ALJ. There was considerable and conflicting evidence introduced at the hearing with respect to what the managements of Sid Goodman & Co.'s retail customers knew about such payments.[9]

On February 28, 1990, the ALJ filed his Initial Decision and Order permanently revoking Petitioner's license.[10] On May 2, 1990, Petitioner appealed to the Department's Judicial Officer. On September 26, 1990, the Judicial Officer adopted the ALJ's Initial Decision and Order, with only minor changes and some additional conclusions.

The Judicial Officer held that the payments by Sid Goodman & Co. were not disclosed to the purchasing agent's employer and that this had resulted in violations of the "false statements," "failure to account" and "implied duty" clauses of

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produce wholesaler with violating the implied duty clause as a result of making undisclosed payments to one of the same individual customer employees to whom Sid Goodman & Co. had made such payments. *In re Tipco, Inc.*, PACA Dkt. No. 89-528. In *Tipco*, the Department revoked Tipco's license for violations of the false statements and implied duty clauses of Section 499b(4). *In re Tipco, Inc.*, 50 Agric. Dec. 871 (Feb. 6, 1991). Tipco has sought review of this decision in the United States Court of Appeals for the Fourth Circuit, and is currently awaiting a decision. *Tipco, Inc. v. USDA*, No. 91-1435 (4th Cir., filed March 4, 1991).

[9] In *Tipco*, the ALJ found that management of one of the same retail customers involved in this case was aware of such payments. *In re Tipco, Inc.*, PACA Dkt. No. 89-528, ALJ's Initial Decision and Order at 22-29 (April 6, 1990) (JA at 415-422). There was absolutely no evidence that Sid Goodman & Co.'s payments had any actual effect on the decisions of the purchasing agents.

[10] Under 7 U.S.C. § 499h, the Department may suspend a license for a period not to exceed 90 days for violations of the Act. If the violation is "flagrant" and "repeated" (and if the willfulness requirement of 5 U.S.C. § 558 is met), the license may be revoked. Sid Goodman & Co.'s arguments that its conduct was not flagrant, repeated, nor willful were rejected by the court of appeals. Although not conceding the correctness of these rulings, Sid Goodman & Co. does not seek review of those issues in this Court.

Section 499b(4). The Petition for Review was filed in the court of appeals on October 25, 1990, pursuant to 28 U.S.C. §§ 2342(2), 2343, 2344 and Rule 15(a) of the Federal Rules of Appellate Procedure.

The court of appeals upheld the Judicial Officer's holding. With respect to the implied duty clause, the court purported to defer to the Department's construction, and yet, as noted below, actually interpreted the clause more broadly and without ever addressing Sid Goodman & Co.'s "plain meaning" argument. Pet. App. 7a, 8a, 10a. With respect to Sid Goodman & Co.'s argument that the Department should have proceeded by rulemaking rather than adjudication, the court merely stated that an agency is "free" to interpret its governing statutes on a case-by-case basis. Pet. App. 12a.[11] The panel declined to rehear

[11] In addition to the questions presented here, Sid Goodman & Co. made a number of other arguments before the Department and in the court of appeals, including: (1) that Congress never intended that the transactions between Sid Goodman & Co. and its *retail* customers would be subject to PACA regulation; (2) that the Department's construction of the implied duty clause violated the void for vagueness doctrine; (3) that the invoices submitted to Sid Goodman & Co.'s retail customers disclosed the actual price to be paid by the retailer and therefore were not "false or misleading" merely because they did not disclose payments to the customer's purchasing agent; and (4) that Sid Goodman & Co.'s accounting and payments to Offutt properly reflected the final amounts actually realized by Sid Goodman & Co. from the sale of the consignor's produce. The court of appeals rejected these arguments.

Sid Goodman & Co. does not concede here that the Department or the court of appeals was correct in rejecting any of its arguments. However, Sid Goodman & Co. recognizes that, unlike the questions which *are* being presented by this petition, these other issues do not have the degree of importance which is generally required to merit review by this Court. Nevertheless, the rulings on the false statement and failure to account violations do not eliminate the need for review in this Court. Upon questioning at oral argument, counsel for the Department conceded that if the alleged violation of the "implied duty clause" of Section 499b(4) were not sustained,

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the rulemaking argument, and the full court declined to hear the issue *en banc*, on November 5, 1991.

REASONS FOR GRANTING THE WRIT

I. THE PROPER INTERPRETATION OF PACA'S IMPLIED DUTY CLAUSE IS AN IMPORTANT QUESTION OF FEDERAL LAW. THIS COURT'S REVIEW NOW, OF THE DEPARTMENT'S NOVEL AND IMPROPERLY SWEEPING INTERPRETATION OF THAT CLAUSE, IS NECESSARY TO AVOID HAVING PETITIONER AND OTHER PACA LICENSEES PUT OUT OF BUSINESS ON GROUNDS NEVER AUTHORIZED BY CONGRESS.

Review on writ of certiorari is appropriate where "a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). There is no dispute among the parties as to the importance of the first question presented here.

The government itself argued below that the "scope of the implied duties clause is an issue of *great* importance to the Department of Agriculture and to the administration of the PACA [and that] the PACA has national application and effect."

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a remand to the Department would be required so that the Department could consider the correctness of imposing the drastic sanction of permanent license revocation based only on the "false statement" and "failure to account" violations. *See NLRB v. Enterprise Ass'n*, 429 U.S. 507, 522 n.9 (1977) (when there have been errors of law, the duty of reviewing courts is generally to remand the case to the agency to allow the receipt and examination of evidence in light of the legal correction); *SEC v. Chenery*, 332 U.S. 194, 196-97 (1947) (reviewing court may not presume, when finding improper grounds were used as the basis for the administrative decision, that the administrator would have made the same decision on other, valid grounds).

Pet. App. 87a.[12] In the companion *Tipco* case, the Judicial Officer revoked the Tipco license, noting his concern that holding otherwise would not send the right "message" to "this multi-billion dollar industry." *Tipco*, 50 Agric. Dec. at 908. Thus, it is also clear that the proper resolution of the scope of PACA's implied duty clause is a matter of great importance, not only to the parties, but also to the more than 15,000 other PACA licensees, many of whom, like Sid Goodman & Co., are small businesses.[13] Indeed, given the pervasiveness of PACA's regulatory reach, like the issues reviewed on a writ of certiorari in *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978), the resolution of the scope of the implied duty clause is important "for the agricultural community." 436 U.S. at 820. *Accord Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (certiorari granted where issue also was important to thousands of similarly situated persons).

Review on a writ of certiorari is particularly appropriate where the issue is "the construction of a major federal statute," *United States v. Donovan*, 429 U.S. 413, 422 (1977), and where, as here, the government acknowledges that the opinion below "addresses an issue of first impression, marking the first instance in which a court of appeals has ruled on the scope of the PACA's implied duties clause." Pet. App. 86a; *Kossick v. United Fruit Co.*, 365 U.S. 731, 733, *reh'g denied*, 366 U.S. 941 (1961) (granting certiorari because it presented "novel questions" of law).

The absence of contrary decisions by other courts of appeals is not a reason to postpone resolution in this Court. Future consideration by other courts of appeals will add little, if anything, to the competing analyses offered now by the parties and

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[12] Letter from Leslie K. Lagomarcino, counsel for the Department, to John M. Greacen, Clerk of the Fourth Circuit (October 4, 1991), requesting that the court of appeals opinion be published (emphasis added).

[13] H.R. Rep. No. 794, 100th Cong., 2d Sess. 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1536, 1537.

by the decision of the Court of Appeals for the Fourth Circuit. Moreover, great hardships may result from a delay in reviewing the Department's interpretation.

If a writ is not granted now, the Department will continue to invoke its open-ended and unjustified interpretation of the implied duty clause. That interpretation could be used to put PACA licensees out of business for actions which Congress never intended to be the basis for license revocation. Nor is there any guarantee that there will soon be another occasion for this Court to correct the Department. Because many PACA licensees are individuals or small businesses, those adversely affected by the Department's improper use of the implied duty clause may not have the resources available that this Petitioner was forced to expend, first to challenge the Department's interpretation before the Department and in the court of appeals, and then to invoke this Court's jurisdiction. In summary, the scope of the PACA's implied duty clause is undeniably an "important question of federal law which has not been . . . settled by this Court." Sup. Ct. R. 10.1(c). The interests of PACA's more than 15,000 licensees and the fair and efficient administration of PACA would best be served by having this Court settle that question now.

A. THE DEPARTMENT'S INTERPRETATION OF THE IMPLIED DUTY CLAUSE IS INCONSISTENT WITH THE CLEAR LANGUAGE OF SECTION 499b(4), IN WHICH CONGRESS ENUMERATED A SPECIFIC PROHIBITION AGAINST A "FAILURE" TO "PERFORM" DUTIES, NOT A BROAD PROHIBITION AGAINST UNFAIR TRADE PRACTICES GENERALLY.

The implied duty clause prohibits licensees from "fail[ing] . . . to perform any specification or duty, express or implied." 7 U.S.C. § 499b(4). Both the Judicial Officer and the court of

appeals held that the implied duty clause prohibits PACA licensees from making the kinds of payments at issue in this case. The Judicial Officer held that such behavior violates a licensee's "implied duty not to corrupt the employees of its customers." Pet. App. 30a, 43a. In upholding the Judicial Officer, the court of appeals stated, in even broader terms, that the implied duty clause imposes "a duty to deal fairly," and encompasses "all unlawful transactions without exception." Pet. App. 10a, 7a. Both constructions pervert the plain language and structure of the statute, and, contrary to Congressional intent, would unjustifiably transform this clause into an all-encompassing prohibition against any and all unfair trade practices.

As this Court has stated, "[t]he starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1575 (1990) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *accord Mallard v. United States*, 490 U.S. 296 (1989). Congress used language in the implied duty clause which does not purport to prohibit *any* affirmative conduct at all. The implied duty clause authorizes revocation of a PACA license only if the licensee "*fail[s]* . . . to *perform*" express or implied duties. 7 U.S.C. § 499b(4) (emphasis added). In other words, the clause *requires* that licensees "perform" their affirmative duties. Those licensees who "*fail*" to "perform" those duties are then subjected to license revocation.

The language of Section 499b(4), in and of itself, simply cannot fairly be read to *prohibit* licensees from "performing" affirmative acts. Nevertheless, the Department and the court of appeals have twisted this plain language to prohibit affirmative acts. In order to fit this prohibition into the language of PACA, the Judicial Officer was forced to conclude that Sid Goodman

& Co. had failed to "perform" a *negative* implied duty – *i.e.*, that Sid Goodman & Co. had failed to perform "the implied duty not to corrupt the employees of its customers." Pet. App. 30a, 43a.[14] This construction is inconsistent with explicit statutory language and cannot be permitted to stand.[15]

B. THE DEPARTMENT'S INTERPRETATION IS CONTRADICTED BY THE HIGHLY SPECIFIC LANGUAGE AND STRUCTURE OF SECTION 499b.

The structure of Section 499b and the language of the implied duty clause itself, one of the many specific prohibitions in this Section, dictate that the clause cannot be transformed into a general prohibition. *See Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979, 1984 (1990) (the principle of *ejusdem generis* dictates "that a general statutory term should be understood in light of the specific terms that surround it").

The language of the seven subsections of Section 499b contains no industry-wide prohibitions against generally "unfair" or "unlawful" conduct. Rather, each of the subsections deals with very specific types of conduct peculiar to the perishable agricultural commodities industry, *e.g.*, the weighing, grad-

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[14] Without any discussion of the Judicial Officer's construction (although claiming deference to that construction), as noted above, the court of appeals recharacterized the implied duty as the "implied duty to deal fairly," prohibiting PACA licensees from engaging in "all unlawful transactions." Pet. App. 10a, 12a.

[15] While some deference is ordinarily owed to an agency's construction of the statutes which it administers, this Court will not let stand a construction which is impermissible or contrary to Congressional intent. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, *reh'g denied*, 468 U.S. 1227 (1984). In addition, less deference is due an agency's construction where, as here, the agency's action is penal in nature. *United States v. Rust Communications Group, Inc.*, 425 F. Supp. 1029, 1033 (E.D. Va. 1976) (citing *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 621-22 (1946)).

ing, and discarding of produce.[16] While the first subsection prohibits licensees from "engag[ing] in any unfair, unreasonable, discriminatory, or deceptive practice *in connection with the weighing, counting, or in any way determining the quantity* of any perishable agricultural commodity," 7 U.S.C. § 499b(1) (emphasis added), none of the subsections prohibits simply *general* "unfair practices."

The implied duty clause addresses the making of false statements, the failure to account and make payment, and the failure to perform express and implied duties. It contains no broad "unfair practices" language or even the kind of narrowly-focused "unfair" practice language actually contained in subsection 499b(1) discussed above. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) (citations omitted).

As this Court has stated, under similar circumstances, "[e]ven if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

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[16] Specifically, the seven subsections of Section 499b address: (1) weighing produce; (2) rejecting or failing to deliver produce; (3) discarding, dumping or destroying produce; (4) making false statements, failing to account or pay, or failing to perform an implied duty in produce transactions; (5) misrepresenting the grading of produce; (6) tampering with the grading or labelling of produce; and (7) post-inspection substitution of produce lots. The full text of the subsection is set out in Pet. App. at 80a.

C. NOTHING IN THE LEGISLATIVE HISTORY OF THE IMPLIED DUTY CLAUSE SUPPORTS THE DEPARTMENT'S INTERPRETATION.

The legislative history of the implied duty clause does not reflect the "clearly expressed legislative intent to the contrary" necessary to overcome the plain language of the statute. *Kaiser Aluminum*, 110 S. Ct. at 1575. The implied duty clause was enacted in direct response to a court decision holding that PACA's requirement of rendering a prompt "account" did not include the obligation to make payment.[17] As the Congress itself recognized, allowing that decision to stand would have nullified a core purpose of PACA – to ensure that produce growers received accounting and payment from distant wholesale merchants. H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942). There is absolutely no indication that, in preventing an attempted judicial emasculation of the prompt accounting provision, Congress intended to give the Department *carte blanche* to use its life or death licensure authority to remedy any ill that the Department might find anywhere in the produce industry.

D. PUBLIC POLICY NEITHER CAN NOR DOES JUSTIFY THE DEPARTMENT'S INTERPRETATION.

No matter what policy arguments may support it, the Department's and the court of appeals' inverted interpretation cannot stand because it transforms the implied duty clause into exactly the kind of catch-all provision which Congress did not include in subsection (4). *See Pavelic & LeFlore*, 493 U.S. at 126. Even if they were applicable, any policy arguments in support of the Department's construction of the implied duty clause fail in the face of the laws which specifically address the kinds of payments that the Department found occurred in this case. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

[17] *Iwata v. Western Fruit Growers, Inc.*, 90 F.2d 575 (9th Cir. 1937).

In *Patterson*, this Court interpreted literally the rights to "make" and "enforce" contracts under 42 U.S.C. § 1981, noting that the conduct to which the petitioner sought to extend the section was already addressed by state contract law and Title VII. 491 U.S. at 177. This Court concluded that the availability of Title VII relief "should deter us from a tortuous construction of [§ 1981] to cover this type of claim." 491 U.S. at 181. The Department should similarly have been deterred from adopting its broad interpretation of the implied duty clause, given that it conceded that the kinds of payments that occurred in this case have been held to be punishable under state law,[18] the FTC Act,[19] and the Robinson-Patman Act.[20] Pet. App. 33a-34a.

There is no evidence that Congress intended to duplicate the prohibitions contained in these broader trade laws. When Congress enacted the Packers & Stockyards Act of 1921 – which prohibits engaging in any "unfair, unjustly discriminatory, or deceptive practice" in that industry – Congress explicitly exempted the packers and stockyards industry from regulation under the FTC Act. 7 U.S.C. § 227(a)(1); 15 U.S.C. § 45(a)(2). Subsequent amendments clarified that Congress' intent was "to avoid unnecessary duplication of effort by the Government and burdens on the [packers and stockyards] in-

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[18] *See, e.g.*, Va. Code Ann. 18.2-444(1) (Michie Supp. 1991) (making guilty of a misdemeanor "[a]ny person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action to the prejudice of his principal's, employer's or master's business").

[19] 15 U.S.C. § 45(a)(1) (prohibiting "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices"); *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939).

[20] 15 U.S.C. § 13(c) (making it unlawful "to pay or grant, or to receive or accept anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods"); *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976).

dustry." 7 U.S.C. § 227(a)(2).[21] The lack of a similar provision under PACA addressing FTC and Department division of responsibility reflects a corresponding lack of Congressional intent to create a general unfair trade practice prohibition under PACA.[22] The implied duty clause cannot be interpreted to create one.[23]

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[21] The amendments to 7 U.S.C. § 227 allow FTC investigations in the packers and stockyards industry where the FTC determines that without such investigation, "effective exercise of its power . . . will be impaired." 7 U.S.C. § 227(a)(2). Nevertheless, the statute still maintains that the FTC must notify the Department of Agriculture of its intent to investigate. If the Department notifies the FTC within ten days that there is a pending investigation of the same subject matter, the FTC may not proceed with its own investigation.

[22] Although he eventually reached the opposite conclusion, even the ALJ in *Tipco* recognized that "it could be inferred that the Congress, to avoid having a proliferation of laws and agencies dealing with unfair and deceptive commercial practices, intended that only specific laws and agencies deal with this matter." *In re Tipco, Inc.*, PACA Dkt. No. 89-528, ALJ's Initial Decision and Order at 19 (April 6, 1990) (JA at 412).

[23] The fact that the implied duty clause has never before been interpreted in this manner, in the nearly 50 years since its enactment, reinforces the error in the Department's construction. *Arcadia v. Ohio Power Co.*, 498 U.S. ___, 111 S. Ct. 415, 420 (1990), *reh'g denied*, ___ U.S. ___, 111 S. Ct. 804 (1991) (rejecting a similar attempt to invoke an alleged catch-all provision, noting that "in 50 years of administering the Federal Power Act, FERC and its predecessor, the FPC, have never decided an issue under § 318 except in connection with orders promulgated under those four sections [preceding the alleged catch-all provision]. Never before this case has § 318 been used as a general conflicts provision").

II. THIS COURT'S REVIEW IS NEEDED TO CLARIFY AND ENFORCE THE MANDATE IN *SEC V. CHENERY*, 332 U.S. 194 (1947), THAT, IN "FILLING IN THE INTERSTICES OF [AN] ACT," ADMINISTRATIVE AGENCIES MUST PROCEED "*AS MUCH AS POSSIBLE*" BY RULEMAKING RATHER THAN ADJUDICATION.

If this Court agrees that the Department's interpretation of the implied duty clause is improper, it need not reach the second question presented. However, that question is also deserving of this Court's review.

In *SEC v. Chenery*, 332 U.S. 194 (1947), this Court addressed how administrative agencies should deal with regulatory statutes when their proper administration required the agency to "fill . . . in the interstices of the Act." 332 U.S. at 202. Although this Court described certain situations in which it might be necessary to fill in these gaps in the course of adjudication, this Court also stressed that adjudication should be the exception: this "function . . . should be performed *as much as possible*, through . . . quasi-legislative promulgation of rules to be applied in the future." 332 U.S. at 202 (emphasis added).

While *Chenery* is most frequently cited for the proposition that, in the proper case, administrative agencies have the discretion to devise new rules in adjudicatory proceedings, neither this Court nor the courts of appeals have sufficiently clarified when and where that discretion ends. Petitioner fully recognizes the problems inherent in *defining* all of the situations in which adjudicative rulemaking may be necessary.[24] Nonetheless, this Court has never suggested that that discretion is unfettered. Indeed, as discussed in greater detail below, this Court has continued to indicate that it is *not* absolute. *Martin v. Occupa-*

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[24] Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, Regulation, July-Aug. 1981, at 25, 27.

tional Safety and Health Review Comm'n, 499 U.S. ___, 111 S. Ct. 1171, 1179 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

Whatever the exact outer limit of that discretion may be, when the Department adopted its novel interpretation of the implied duty clause in this adjudicatory proceeding, without even any explanation of why the Department could not have done so first in rulemaking, the Department transgressed that limit and abused its discretion in violation of Section 10(e)(2)(a) of the APA. 5 U.S.C. § 706(2)(a).

In *Chenery*, this Court properly required rulemaking *as much as possible*, yet here, there was no good reason why the Department could not have adopted its new interpretation of the implied duty clause in a rulemaking proceeding.[25]

A. *CHENERY* LIMITS AGENCY DISCRETION TO APPLY NEW STATUTORY INTERPRETATIONS FOR THE FIRST TIME IN ADJUDICATORY PROCEEDINGS.

In *Chenery*, this Court noted that rulemaking was essentially not "possible" in a number of situations: (1) where the agency must reserve the power to respond to "unforeseeable situations"; (2) where the agency has had insufficient experience to warrant "rigidifying its tentative judgment into a hard and fast rule"; and (3) where the problem is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." 332 U.S. at 202-03. Therefore, "*[i]n those situations*, the agency must retain power to deal with the

[25] There was no risk of Sid Goodman & Co. getting a "free bite" at the apple. As noted above, the Department could have proceeded against Sid Goodman & Co. on the basis of the "false statements" or "failure to account" violations. The Department could also have sought to have Sid Goodman & Co. prosecuted under other acts that specifically prohibited "unfair" trade practices or such payments.

problems on a case-to-case basis if the administrative process is to be effective." *Id.* (emphasis added).

However, the Department was not in one of "those situations" described in *Chenery* when it chose to proceed by adjudication in adopting its admittedly novel interpretation of the implied duty clause.[26] Therefore, under *Chenery*, the

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[26] The Department cannot justifiably claim that the payments to purchasing agents that occurred here were unforeseeable in the produce industry. The Department had previously encountered similar allegations in the industry and had contemplated legal action against the alleged offender under PACA, presumably based upon the implied duty clause. Testimony of James Frazier, Assistant Chief of the PACA Branch of the Department, *In re Sid Goodman & Co.*, Transcript of Proceedings before the ALJ at 204-06 (JA at 226-28). Although the Department claims that a lack of evidence ultimately prevented it from instituting formal proceedings, this incident demonstrates that the Department was aware that such conduct did occur in the perishable agricultural commodities industry, that the Department interpreted PACA to prohibit such conduct, and that future disciplinary actions were therefore foreseeable. Therefore, the Department should have made public its interpretation of the scope of PACA and the implied duty clause through rulemaking under the APA.

The Department neither lacks experience with such payments nor holds only a tentative judgment as to their propriety. The fact that the Department had contemplated disciplinary action in the above mentioned case clearly indicates that the Department believed that such conduct violated PACA. Moreover, the Department had considerable experience in enforcing prohibitions against commercial bribery. Specifically, the Department has interpreted (and enforced) the unfair practices provision in the Packers & Stockyards Act to prohibit commercial bribery for many years. Pet. App. 33a. Therefore, there is no basis for arguing that the Department had reason to be reluctant in "rigidifying" through rulemaking its judgment that commercial bribery was prohibited by the implied duty clause.

Finally, the Department cannot claim that what it regards as "commercial bribery" is so specialized and varying in nature that it is incapable of being adequately defined in a rule. Commercial bribery has been clearly defined in other contexts, both by the Department and by others. Pet. App. 33a-34a. Under the Packers & Stockyards Act and the Federal Meat Inspection Act, the Department has, in fact, issued policy statements to clarify its position

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Department abused its discretion by failing to proceed by rulemaking.[27]

B. THIS COURT HAS CONTINUED TO RECOGNIZE LIMITS ON ADJUDICATORY ANNOUNCEMENTS OF NEW STATUTORY INTERPRETATIONS.

Subsequent decisions by this Court have continued to recognize that rulemaking may be *required* in certain circumstances. In *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court stated:

> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.

415 U.S. at 232. Like the beneficiaries in *Morton*, Sid Goodman & Co. has had an important property interest[28] denied in an adjudicative proceeding by the application of a novel statutory interpretation which had not previously been announced by the regulating agency.

In *NLRB v. Bell Aerospace Co.*, 416 U.S. at 294-95, this Court, although noting that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," nevertheless clearly stated that "there may be situations

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concerning the exchange of payments between purchaser and seller. 9 C.F.R. § 203.5; 9 C.F.R. § 203.14; 44 Fed. Reg. 37322 (June 26, 1979). Thus, *Chenery* mandates that similar regulatory prohibitions of commercial bribery under PACA should have been made.

[27] Under 7 U.S.C. § 499o, the "Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of [PACA]."

[28] *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (noting the property interest in a license).

where the Board's reliance on adjudication would amount to an abuse of discretion." 416 U.S. at 294. Such a situation did not exist in *Bell Aerospace* only because it was "doubtful whether any generalized standard could be framed which would have more than marginal utility." *Id.* Moreover, this Court suggested that agency discretion is even more limited where, as here, there are "fines or damages" resulting from the new statutory interpretation. 416 U.S. at 295.

C. UNLIKE THE FOURTH CIRCUIT, OTHER CIRCUIT COURTS HAVE LIMITED AGENCY DISCRETION TO ANNOUNCE NEW STATUTORY INTERPRETATIONS IN ADJUDICATIONS.

Several courts of appeals have held that administrative agencies may not "change" statutory interpretations in adjudications. *Stoller v. CFTC*, 834 F.2d 262 (2d Cir. 1987); *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). In *Stoller*, the operative statutory term was not defined, and there had been no prior disciplinary actions prohibiting such conduct.[29] So, from the perspective of the target, the agency had effectively "*change[d]* its view." *Stoller*, 834 F.2d at 266. In other words, in both *Stoller* and the immediate case, the "change" in policy was the establishment of a new requirement where there had been no prior statement of that requirement from statutory or regulatory sources. However, the Court of Appeals for the Fourth Circuit overlooked this in its initial opinion (and denied Sid Goodman & Co.'s Petition for

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[29] The Department conceded that no regulation directly addresses Sid Goodman & Co.'s conduct, but claimed that the "closest" regulation is 7 C.F.R. § 46.26 (1991). Testimony of James Frazier, Tr. at 207 (JA at 229). Section 46.26, however, essentially only repeats the language of the implied duty clause of Section 499b, providing that: "The responsibility is placed on each licensee to *fully perform* any specification or duty, express or implied, in connection with any transaction handled subject to the Act" (emphasis added) (full text reprinted in Pet. App. at 83a).

Rehearing specifically addressed to this point). Pet. App. 1a, 11a-12a. Similarly, in *Ford*, the Ninth Circuit has held that "an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." *Ford*, 673 F.2d at 1009. The Department's transformation of the implied duty clause into a catch-all unfair trade practices provision obviously has widespread application in the perishable agricultural commodities industry.[30]

Even if this Court rejects the approaches taken in *Stoller* and *Ford*, or finds them somehow distinguishable, *Chenery* itself requires that the Department at least *consider* the choice between announcing a new rule by rulemaking or adjudication, and making a determination that rulemaking is not "*possible.*" Absent that requirement, neither *Chenery* nor *any* notion of a limit on agency discretion can have any meaning or effect.[31] In

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[30] Moreover, the fact that the court of appeals decision is unpublished does not affect the widespread application of this interpretation. The Judicial Officer's opinion has been published, and can be used as precedent in future Department adjudications. In addition, the fact that those in the Department are aware of the court of appeals opinion is likely to encourage broader and more frequent use of the implied duty clause to prohibit conduct not previously considered to be prohibited under PACA. .

[31] Even the Department's Judicial Officer has recognized the inherently arbitrary nature of announcing new interpretations in adjudication rather than rulemaking. *In re Wiley Prentice*, 47 Agric. Dec. 1655 (1988). The Judicial Officer held that the Department could not enforce its inspection program under the Plant Quarantine Act until the prohibitions thereunder were set forth in regulations. In an opinion that correctly identified the Department's attempted adjudicatory effort as a means of establishing a broad new public requirement, the Judicial Officer characterized the effort as regulatory in nature and held that:

> Under the Administrative Procedure Act (APA) (5 U.S.C. § 553), before a regulation is adopted imposing requirements on members of the public, the agency must engage in notice and comment rulemaking, giving the public an opportunity to be heard.

47 Agric. Dec. at 1682.

addition, if the minimum requirement for "consideration" is to be enforceable, the agency must, again at a minimum, create a record sufficient for reviewing courts to determine that the issue was properly considered. There is no dispute that neither of these requirements was met here. Thus, even if the Department's interpretation of the implied duty clause were permissible, at a minimum, under *Chenery*, the absence of any record of consideration of the possibility of establishing the Department's new "reverse" interpretation of the implied duty clause by rulemaking requires reversal of the decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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